IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Civil Action No. 50 C 383

FRANK KORNFEIND, Doing Business as Chicago-Nebraska Motor Express, *Plaintiff-Appellant*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants-Appellees*

MOTION TO AFFIRM

Pursuant to Rule 12, para. 3, of the Revised Rules of the Supreme Court of the United States, appellees move that the judgment and decree of the district court be affirmed.

This is a direct appeal from the final judgment and decree of a specially constituted three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325. The decree, entered May 26, 1952, dismissed appellant's complaint which sought to set aside certain orders of the Interstate Commerce Commission. Appeal was allowed on July 23, 1952 and appeal papers were served on the same date.

The facts, which are undisputed, are set forth in detail in the district court's Findings of Fact and Conclusions of Law. They may be briefly summarized as follows:

In June 1944, the Interstate Commerce Commission issued a certificate of public convenience and necessity to one Harper, authorizing motor carrier operations over regular routes between Chicago, Illinois and Hastings, Nebraska. In 1946, by appropriate order, the Commission approved the acquisition of these rights by one C. H. Smith. In April 1948, the Commission authorized a five-year lease of the operating rights to one W. G. Ross. In December of the same year, the Commission authorized appellant and Ross, as a partnership doing business under the name of Chicago-Nebraska Motor Express, to be substituted as lessee of the operating rights in lieu of W. G. Ross.

The lease, conforming to the Commission's Transfer Rules (see 49 C.F.R. 179.4, Appendix, *infra*) contained the following provision:

> * * * all operating rights involved in the transaction shall revert to the transferor at any time prior to the expiration of said term, or upon a discontinuance of operations thereunder by the transferee at any time prior to the expiration of said term. In case of reversion the transferor shall give immediate notice thereof to the Commission.

The lessee subsequently suspended operations for approximately ninety days.[1] On April 18,

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[1] This is conceded by appellant. See Statement as to Jurisdiction, p. 15.

1949, Smith, the lessor, filed a petition with the Commission alleging that the partnership had abandoned the operations covered by the lease, had permitted insurance required by Commission regulations to lapse, and had ignored demands made upon it to reinstitute service. The petition prayed issuance of an order terminating the lease. Upon consideration of the petition and appellant's answer thereto, Division 5 of the Commission, without holding a hearing, entered an order dated August 3, 1949, terminating the lease arrangement and requiring Smith to resume operations in his own behalf within a period of thirty days. On January 10, 1950, the Commission denied reconsideration of the order.

On May 23, 1950, the Commission on its own motion reopened the proceedings for a formal hearing. A subsequent order, dated June 9, 1950, referred the matter to a Joint Board sitting in Omaha, Nebraska. After a full hearing, the Joint Board, on October 27, 1950, issued a proposed report and order recommending that Smith be directed to resume operations under the certificate of public convenience and necessity. In its report, the Joint Board found that there had been a discontinuance of operations by the partnership which caused a reversion of the operating rights to Smith; that the partnership composed of the appellant and Ross was dissolved on December 15,

1948, and that thereafter no operations had been conducted by the partnership as such; that no operations were conducted by the partnership, by the appellant, or by the appellant and any other person associated with him for a period of approximately ninety days prior to June 1949; that discontinuance of the operations resulted in the reversion of the operating rights to Smith, and that the lease approved April 8, 1948 was of no further force and effect. On March 27, 1951, Division 5 issued a report (52 M.C.C. 567) which adopted the findings of fact made by the Joint Board. Its order directed that the orders previously entered in the proceedings remain in full force and effect. On November 13, 1951, the entire Commission denied a petition for reconsideration. Appellant's complaint sought to set aside the orders terminating its rights.

In substance, appellant contends that, regardless of the terms of the lease and the requirements of the Commission's Transfer Rules, the rights of the lessee could not be terminated until it was given "a reasonable period of time to correct its alleged deficiencies, in the light of the requirements of 49 U.S.C. Section 312 (a) * * *" (Statement as to Jurisdiction, p. 2).

Section 212 (a) of the Interstate Commerce Act (see Appendix, *infra*), upon which appellant rests its case, relates exclusively to the suspension and

revocation of "certificates, permits and licenses".[2] It provides in part that no "certificate, permit or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided etc." The instant case does not involve a revocation of the certificate acquired by Smith. Indeed, it will be noted that the Commission's order requires Smith to resume the operations authorized by the certificate. We have here the simple question: Did the Commission have the authority to declare that the temporary transfer of Smith's rights to appellant, pursuant to a lease approved by the Commission, had terminated?

The issue is controlled by Section 212 (b) which provides in substance that transfers may take place "pursuant to such rules and regulations as the Commission may prescribe". Exercising its authority to prescribe rules, the Commission has directed (49 C.F.R. 179.4):

> § 179.4 *Leases and contracts to operate.* Applicants who seek approval of a transfer of

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[2] These terms are defined in the Act (Section 203 (a), 5, 6, 7) as follows: "The term 'certificate' means a certificate of public convenience and necessity issued under this part to common carriers by motor vehicle; [t]he term 'permit' means a permit issued under this part to contract carriers by motor vehicle; [t]he term 'license' means a license issued under this part to a broker."

> operating rights for a limited period, whether by lease, operating contract, or otherwise, shall state in their application the specific period for which such transfer is sought, the consideration for such transfer and the time and method of payment thereof, and that the applicants have agreed in writing that all operating rights involved in the transaction shall revert to the transferor at the expiration of said term, or upon a discontinuance of operations thereunder by the transferee at any time prior to the expiration of said term. In case of reversion, the transferor shall give immediate notice thereof to the Commission.

As previously noted, the lease which the parties submitted to the Commission for approval contained the provision that the leased rights would revert to the lessor in the event of a discontinuance of service by the lessee. The lessee, having admittedly failed to comply with the explicit conditions on the basis of which the Commission approved the temporary leasing of the rights, can scarcely be heard to complain that his rights have now been terminated in accordance with the Rules of the Commission and the terms of the lease.

A party who has been issued a franchise by the Commission on the basis of his representations that he is fit, willing and able has no right to transfer that franchise at will. Section 212 (b); *United*

States v. *Resler*, 313 U.S. 57, 61; cf. *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, 448. If the Commission grants him the privilege of leasing the rights to another for a limited period of time, it can attach reasonable conditions to that permission. *Ibid.*[3] And there can be no serious question that it is reasonable to provide that the substitute or lessee can exercise the leased rights only so long as he renders continuous and adequate service to the public. See Section 204 (a) (1).

Appellant makes the subsidiary point that the orders issued by Division 5 and by the Commission on August 3, 1949 and January 10, 1950, respectively, were not based upon a hearing. It would appear wholly unnecessary to determine whether the pleadings, standing alone, warranted entry of those orders, since a full hearing was held before a Joint Board prior to the time that the ultimate orders of the Commission were issued.[4]

Appellant also questions the adequacy of the notice which set the case for hearing before the Joint Board. The district court stated (Fdg. No. 6):

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[3] *On-Time Transfer Co.* v. *Buckingham*, 44 M.C.C. 389, cited by appellant, is not in point. As stated in the report of Division 5 (52 M.C.C. at 574), that case did not involve Section 212 (b) or the Commission's Transfer Rules issued thereunder.

[4] It may be noted parenthetically that appellant has not at any stage of the proceedings denied that it discontinued service.

> In an order dated June 9, 1950, the Commission notified all parties that the matter would be the subject of a formal hearing on July 11, 1950, before Joint Board 136, at Omaha, Nebraska. Said order contained an elaborate statement of the facts in controversy, and a detailed recitation of the administrative history of the controversy. * * *

The court held further (Concl. No. 3) that this order "contains sufficient information to inform the parties of the nature of and reason for such hearing". It is appellant's position, however, that the notice was defective because it failed to define the issues which the Joint Board would consider. This contention is frivolous. Prior to issuance of the order of June 9, 1950, Smith had petitioned the Commission to terminate the lease, appellant had answered the petition, and the Commission had entered orders granting the relief prayed. This prior administrative history was fully recited in the notice which set the matter down for hearing. Consequently, there can be no doubt that appellant knew full well the nature of the matter assigned to the Joint Board for its consideration. Obviously, there was but one matter to consider—whether the termination of the lessee's rights had been proper.[5]

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[5] Since appellant concedes that service was discontinued, it is difficult to imagine what he could possibly gain by a further hearing. The issue of law—whether that discontinuance warranted termination of the lease—is the issue which he has already taken to court.

The substantive issue before the district court—the authority of the Commission under Section 212 (b) to regulate transfers—has been correctly decided. *United States* v. *Resler, supra.* It is equally plain that the conditions affixed to the lease in question were reasonable. Since it is undisputed that appellant failed to comply with these conditions, it is evident that this case presents no substantial question. The decree of the district court should accordingly be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

EDWARD M. REIDY,
Chief Counsel,
Interstate Commerce Commission.

AUGUST 1952.

APPENDIX

Excerpts from Transfer Rules Promulgated by the Commission and Published in the Code of Federal Regulations 1949 Ed.). Part 179.

§ 179.1 *General.* (a) As used in this part, the term "transfer" shall include all transactions, not included within section 5 and 210a (b) of the Interstate Commerce Act, whether by purchase, lease, contract to operate, or otherwise, whereby an operating right as a motor carrier arising out of the Interstate Commerce Act is acquired by one person from another.

(b) The term "operating right" as used in this part includes the right to operate as a motor carrier in interstate or foreign commerce over a route or routes or within a specified territory, as authorized by a certificate of public convenience and necessity or a permit issued by this Commission. . . .

* * *

(d) No attempted transfer of any operating right shall be effective except upon full compliance with the rules and regulations in this part and until after the Interstate Commerce Commission has approved such transfer as herein provided. . . .

* * *

§ 179.2 *Applications to transfer.* (a) Applications for approval of the transfer of operating rights shall be made in writing to the Commission

and shall be in such form and contain such information as the Commission shall prescribe.

* * *

(c) . . . the proposed transfer described in any such application shall be approved if it appears that the proposed transaction is one which is not subject to the provisions of section 5, Interstate Commerce Act, that the proposed transfer, if approved, will not result in unlawful ownership or control of a motor carrier, and that the proposed transferee is fit, willing, and able properly to perform the service authorized by the operating rights sought to be transferred, and to conform to the provisions of the Interstate Commerce Act and the requirements, rules and regulations of the Commission thereunder. Otherwise the application shall be denied.

* * *

§ 179.4 *Leases and contracts to operate.* Applicants who seek approval of a transfer of operating rights for a limited period, whether by lease, operating contract, or otherwise, shall state in their application the specific period for which such transfer is sought, the consideration for such transfer and the time and method of payment thereof, and that the applicants have agreed in writing that all operating rights involved in the transaction shall revert to the transferor at the expiration of said term, or upon a discontinuance of operations thereunder by the transferee at any time prior to

the expiration of said term. In case of reversion, the transferor shall give immediate notice thereof to the Commission.

Sections 212 (a) and 212 (b) of Interstate Commerce Act, as amended, 49 U.S.C. 312 (a) and 312 (b)

(a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this

part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further*, That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of Section 206, 209, or 211, or by virtue of the second proviso of section 206 (a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211 (c), 217 (a), or 218 (a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

(b) Except as provided in section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 321

FRANK KORNFEIND, DOING BUSINESS AS CHICAGO-NEBRASKA EXPRESS,

Appellant,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

REPLY TO MOTION TO AFFIRM

JOSEPH E. KELLER,
THOMAS H. WALL,
Counsel for Appellant.

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FRANK KORNFEIND, DOING BUSINESS AS CHICAGO-NEBRASKA MOTOR EXPRESS,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees

REPLY TO MOTION TO AFFIRM

Pursuant to Rules 7(3) and 12(3) of the Revised Rules of the Supreme Court of the United States, Appellant replies as follows to Appellees' Motion to Affirm:

Appellees have completely misstated the issues in this appeal. The substantive issue before the District Court was not, as Appellees state (Motion to Affirm, p. 9), concerned with the authority of the Commission under Section 212(b) of the Interstate Commerce Act (49 U.S.C. Sec. 312(b)) to regulate transfers. On the contrary, the issue relates to Sec. 212(a) of that Act and certain provisions of the Administrative Procedure Act, discussed infra. Further, Appellant does not challenge the legal principle, relied upon by Appellees, that a party who has been issued a franchise by the Interstate Commerce Commission on the basis of his representations that he is fit, willing and able,

has no right to transfer that franchise at will (*Motion to* Affirm, p. 6). For that reason, *United States* v. *Resler*, 313 U. S. 57, relied upon by Appellee, is inapplicable.[1] The question presented in this appeal is whether, consistent with the requirement of Section 212(a) of the Interstate Commerce Act (49 U.S.C. Sec. 312(a)), and Section 9(b) of the Administrative Procedure Act (5 U.S.C. Sec. 1008(b)), the Commission has the legal authority to terminate the rights of Appellant, who had been authorized by that agency to lease the operating rights of his lessor, without giving the lessee a reasonable period of time to correct alleged deficiencies and without affording the lessee (Appellant), before hearing, ample notice of the legal and factual issues in due time to examine, consider and prepare for those issues. Section 5(a) of the Administrative Procedure Act (5 U.S.C. Sec. 1004(a)).

Appellee takes the position that Section 212(a) of the Interstate Commerce Act relates exclusively to the suspension and revocation of "certificates, permits and licenses," and that since the Commission did not revoke the certificate acquired by Smith, (Appellant's lessor), Appellant has no standing to complain. It is clear that the Commission, in approving the lease and in authorizing Appellant and Ross, as a partnership, doing business under the name of Chicago-Nebraska Motor Express, to perform this service, gave to Appellant and his partner a license as

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[1] There, the court held that the Commission acted within its authority to prescribe rules and regulations to implement Section 212(b) in ruling that its consent was a condition precedent to an effective transfer governed by that section. However, it should be noted that in the *Resler* case the court stated, 313 U.S. 57, 60: "In many respects a transferee such as appellee stands in the same relation to the Commission as an original applicant for permission to operate."

that term is defined in Section 2(e) of the Administrative Procedure Act.[2] Despite the fact that the Administrative Procedure Act is applicable to the instant case, and despite the fact that the Interstate Commerce Commission is bound by the requirements of that Act (*Cf. Riss and Company, Inc. v. Interstate Commerce Commission*, 341 U. S. 907), Appellee contends, in effect, that its requirements may be ignored by the Commission and that Appellant has no standing to complain, since lessor Smith's authorization was not withdrawn. In order to follow Appellee's contention to its logical conclusion, it would be necessary for this Court to hold: (1) that Section 212(a) of the Interstate Commerce Act is inapplicable to transfer cases; (2) that the Interstate Commerce Commission is not subject to the Administrative Procedure Act, particularly, Section 9(b); and (3) that because Section 212(b) of the Interstate Commerce Act is silent with respect to the procedure to be followed in transfer cases, the Commission is free to revoke its approval of a transfer at any time without notice, without hearing, and without any opportunity to achieve compliance with the requirements of the Commission. Such a position is wholly untenable.

It is respectfully submitted that the instant case presents a substantial question for the decision of this court, *i.e.*, the application of Section 212(a) of the Interstate Commerce Act and Section 9(b) of the Administrative Procedure Act, to the revocation of Commission approval of

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[2] 5 U.S.C. Sec. 1001(e). A license includes "• • • the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." Licensing includes "• • • agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license."

the transfer of a certificate. Therefore, it is submitted that the Appellee's motion to affirm should not be granted.

Respectfully submitted,

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August 14, 1952.